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No.

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In the Supreme Court of the United States

October Term, 1984

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

v.

JOANNE LIMBACH, TAX COMMISSIONER OF OHIO,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the connection and use of local data processing terminals via direct interstate telephone lines to computers in another state to input, direct the processing of and retrieve data from those computers is a transaction in interstate commerce.

2. Whether the Due Process Clause and the Commerce Clause prohibit a state from imposing an unapportioned use tax on the gross amount of a payment covering both the substantial use of property either still in interstate commerce or located at all times outside the taxing state, as well as the substantial use of property within the taxing state.

PARTIES TO THE PROCEEDING

The parties below were The Union Central Life Insurance Company and Edgar L. Lindley, Tax Commissioner of Ohio. Joanne Limbach is designated as Appellee on this appeal as she is the successor to the office of Tax Commissioner of Ohio.

CORPORATE AFFILIATIONS

The Union Central Life Insurance Company is a mutual life insurance company organized under the laws of Ohio. It is not the subsidiary of any other corporation and itself has no subsidiary corporations or affiliates, other than two wholly-owned subsidiaries, except for UCL Life Assurance Corporation. The present case involves the assessment of tax on payments by The Union Central Life Insurance Company to Electronic Data Services Corporation, an unrelated entity not a party to this proceeding. Electronic Data Services Corporation has since become a subsidiary of General Motors Corporation.

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JOANNE LIMBACH, TAX COMMISSIONER OF OHIO,
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JURISDICTIONAL STATEMENT

Appellant The Union Central Life Insurance Company ("Union Central") appeals from that portion of the final order of the Supreme Court of Ohio ("Ohio Supreme Court") which affirmed in part the decision of the Board of Tax Appeals of the State of Ohio ("Board of Tax Appeals"). That portion of the decision upheld the assessment of use tax on the gross fees paid by Union Central to a third party for data processing services over Union Central's objection that the assessment constituted an unapportioned levy on a transaction in interstate commerce in contravention of the Commerce and Due Process Clauses of the United States Constitution.

OPINIONS BELOW

The opinion of the Ohio Supreme Court affirming in part and reversing in part the decision of the Board of Tax Appeals is reported at 12 Ohio St.3d 80, 465 N.E.2d 440 (1984). A copy of this opinion appears in the appendix at pages A1 through A7.

The decision and order of the Board of Tax Appeals is not officially reported, but may be found in 3 [Ohio] St. Tax Rep. (CCH) ¶201-284 (Oct. 4, 1983). A copy of the Board's opinion appears in the appendix at pages A9 through A17.

The journal entry of the Tax Commissioner of Ohio is not reported. A copy of that document appears in the appendix at pages A19 through A22.

JURISDICTION

The Ohio Supreme Court rendered its opinion and entered its order on July 11, 1984. A rehearing of this case was denied by the Ohio Supreme Court by order entered September 12, 1984. A Notice of Appeal to this Court (Appendix F at A27 through A29) was filed in the Ohio Supreme Court on October 29, 1984. The time within which to docket this appeal in this Court expires December 11, 1984, and timely docketing has been made. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause (U.S. Const. art. I, §8, cl. 3) and Due Process Clause (U.S. Const. amend. XIV, §1) of the United States Constitution.

Ohio Revised Code §§5739.01, 5739.02, 5741.01 and 5741.02, as amended by 1967-68 Ohio Laws 1981-85 (Ohio

Rev. Code §5739.01), 2031-33 (Ohio Rev. Code §5741.01); 1971-72 Ohio Laws 1468-70 (Ohio Rev. Code §5741.02), 1575-79 (Ohio Rev. Code §5739.02); 1973 Ohio Laws 514-18, 898-906 (Ohio Rev. Code §§5739.01, .02), 1116-20 (Ohio Rev. Code §5739.02); 1974 Ohio Laws 198-206 (Ohio Rev. Code §§5739.01, .02), 493-498 (Ohio Rev. Code §5739.01), 516-520 (Ohio Rev. Code §§5741.01, .02), 1252-57 (Ohio Rev. Code §5739.02); 1975-76 Ohio Laws 1366-71 (Ohio Rev. Code §5739.01), 1374-76 (Ohio Rev. Code §5741.01), 3445-50 (Ohio Rev. Code §5739.01).

These constitutional and statutory provisions are reproduced in pertinent part as Appendix G.

STATEMENT OF THE CASE

Ohio imposes a use tax on the "storage, use, or other consumption in this state of tangible personal property. . . ." Ohio Rev. Code Ann. §5741.02(A) (Page 1973). The provision of data processing services is deemed to be a transfer of tangible personal property. *Financial Computer Services, Inc. v. Lindley,* 70 Ohio St.2d 243, 436 N.E.2d 1025 (1982); *Accountant's Computer Services, Inc. v. Kosydar,* 35 Ohio St.2d 120, 298 N.E.2d 519 (1973).

In the present case, Union Central contracted with Electronic Data Services Corporation ("EDS") of Dallas, Texas for the provision of data processing services. Under the parties' agreement, EDS provided all necessary elements for Union Central to process its own data—programming, main frame computers, remote terminals and peripheral equipment—in a manner fully integrated with Union Central's business operations. Portions of the system were located in Texas while other portions were located in Ohio. The computers, memory banks and programs were located in Dallas, Texas at an EDS facility where the computers and programs

were managed by EDS employees. Appendix A at A2. The terminals were located in Ohio at Union Central's offices.

Union Central employees in Forest Park, Ohio accessed the computers in Texas to input, direct the processing of and retrieve data by using video screen and hard-copy terminals connected with the computers via interstate telephone lines. These terminals were installed on Union Central's premises by EDS, which also owned and serviced this equipment. EDS employees came to Ohio to design the system and to train Union Central personnel in its use and provided Union Central with operating manuals.

Under the agreement between the parties, each month Union Central paid EDS a lump-sum fee covering everything associated with the system.[1] This single, non-itemized monthly fee covered the development of the programming, computer time and the use of equipment. The Tax Commissioner assessed use tax on Union Central's payment of this monthly fee for a period of thirty-seven months. Union Central concedes that it made substantial use of tangible personal property in Ohio, such as the use of the terminals at its offices in Ohio, which property would by itself be subject to use tax. However, throughout the entire audit period, Union Central also made substantial use of property outside of Ohio, such as the computers, programs and telephone lines, which never entered the state. Notwithstanding this latter fact, the Ohio Tax Commissioner levied use tax on the gross fees paid to EDS by Union Central.

Union Central initially challenged the assessment by a Petition for Reassessment before the Tax Commissioner objecting to the assessment, among other reasons, on the

1. There was also a limited class of other incidental charges, but those charges were deleted from the assessment by the Ohio Supreme Court and are not in issue here.

grounds that both the Commerce Clause and the Due Process Clause prohibited the taxing of these transactions as they were still in interstate commerce. The Tax Commissioner denied Union Central's objection on the ground that Union Central received processed data in Ohio and Ohio therefore had authority to tax the transactions.

A *de novo* review of the Tax Commissioner's decision was sought on appeal to the Board of Tax Appeals. In its notice of appeal and briefs to the Board of Tax Appeals, Union Central specified that the assessment was contrary to both the Commerce Clause and the Due Process Clause and argued to the Board that the assessment was void as an unapportioned levy on transactions in interstate commerce and involving the use of property outside Ohio. The Board of Tax Appeals ruled (1) that as the results of the data processing came back to Ohio, Ohio had constitutional authority to tax the total payment and (2) that the processing took place in Ohio and the constitutional arguments were not relevant.

On appeal to the Ohio Supreme Court, in its notice of appeal and briefs to the Court Union Central challenged the assessment as being contrary to the Commerce Clause and the Due Process Clause as an unapportioned levy on the use of property either still in interstate commerce or located outside Ohio and also challenged the finding of the Board that the processing of data occurred in Ohio. As the Ohio use tax statute makes no provision for apportionment of the tax, Union Central requested that the entire assessment be voided. The Ohio Supreme Court recognized that the processing of data took place in Texas where the computers, memory banks and related equipment were located and that Union Central employees in Ohio accessed those computers in Texas by using local terminals connected to the computers by interstate telephone lines. Appendix A at A2. The Ohio Supreme Court found that because a portion of the tangible property used

by Union Central was located within Ohio, the entire fee was taxable by Ohio. This latter finding was challenged by Union Central in its Motion for Reconsideration and the challenge to the unapportioned nature of the levy was also reiterated. Its Motion for Reconsideration being denied without opinion, Union Central instituted the present appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented in this case are substantial and merit plenary consideration for three reasons.

First, the decision of the Ohio Supreme Court is in irreconcilable conflict with an established line of decisions of this Court commencing with *Western Union Telegraph Co. v. Texas,* 105 U.S. 460 (1882), and continuing through *Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948), and *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), holding that a tax on activity in interstate commerce is valid only if apportioned to the segment present in the taxing state. The Ohio Supreme Court erroneously construed such decisions of this Court as *Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939), as authorizing the imposition of a use tax on the total unapportioned fees paid for the use of property where only a portion of that property comes to rest within the taxing state.

Second, the decision of the Ohio Supreme Court defines the constitutional nexus between the taxing state and a transaction involving the interstate use of computer equipment for the imposition of use taxes under standards inconsistent with *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327 (1944), and *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937). The Ohio Supreme Court excused itself from applying the Constitution's apportionment requirements by resort to an overly broad definition of intrastate commerce. The states cannot be

allowed to avoid the terms of the Commerce Clause and Due Process Clause by the misclassification of transactions which are in fact in interstate commerce.

Third, the issues presented on this appeal are likely to arise whenever a state seeks to impose a sales or use tax on transactions involving interstate communications, an increasingly important concern in light of the technology of this era. The questions raised are therefore of fundamental importance to the taxing authorities of all states imposing sales, use and gross receipts taxes and to the many persons either offering or participating in interstate data processing transactions potentially subject to such taxes.

While this Court has addressed questions of the apportionment of gross receipts taxes, it has not directly addressed the apportionment of sales and use taxes on interstate transactions nor has the Court previously considered the application of interstate commerce and due process restrictions to the taxing authority of the states with respect to modern data processing technologies. In particular, the substantial use of video terminals (computer terminals which display data on a television-type screen and do not produce hard copy printout) in the present case raises a novel factual setting for the determination of whether a local situs has been acquired sufficient to allow the imposition of a use tax on an unapportioned payment.

I

The Decision Below Erroneously Determined That The Use Of Out-Of-State Computers Via Telephone Connection With Local Terminals Is Not An Activity In Interstate Commerce.

The Ohio Supreme Court determined that the terminals and other items which comprise the base charge were not used

to further interstate commerce and that the Tax Commissioner therefore properly levied use tax on the base charge. Appendix A at A6-7. Union Central acknowledges that the terminals did come to rest in Ohio before being connected to the total system. However, the base charge covered more than the usage of the terminals. As found by the Ohio Supreme Court, the base charge covered Union Central's use of the programs, computers and all other equipment. Appendix A at A2.[2] The computers and programs were located in Dallas, Texas. The telephone lines which connected this equipment to the terminals in Ohio, of course, spanned several states. Every working day, Union Central employees in Ohio would sit before those terminals and (1) input data which was stored in the computer's memory banks in Dallas, (2) direct the computer to perform certain functions, and (3) direct the computer to output certain data.

Under the facts as determined by the Ohio Supreme Court, it is untenable to suggest that this data processing equipment is not used in interstate commerce. The terminals in Ohio were connected by telephone line to the computers in Dallas and data flowed back and forth over those lines between the equipment in Texas and that in Ohio. It has been a long-standing tenet of constitutional law that the transmission of data across state boundaries via electronic signal is an activity in interstate commerce. *Cooney v. Mountain States Telephone & Telegraph Co.*, 294 U.S. 384 (1935); *Ratterman v. Western Union Telegraph Co.*, 127 U.S. 411 (1888); *Western Union Telegraph Co. v. Texas*, 105 U.S. 460 (1882); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1

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2. For purposes of Ohio sales and use tax, computer programs embodied in a tangible medium, such as on tape or disc, are considered tangible personal property. *Central Trust Co. v. Lindley*, 3 [Ohio] St. Tax Rep. (CCH) ¶200-378 (Ohio B.T.A. July 25, 1979); *Cleveland Trust Co. v. Lindley*, 3 [Ohio] St. Tax Rep. (CCH) ¶200-091 (Ohio B.T.A. Aug. 30, 1977).

(1878). Just as a person uses a telephone handset to converse with an individual in another state, so, too, did Union Central employees use the local terminals to communicate with and direct the operation of the Dallas computers.

Union Central agrees that to the extent the terminals and any other tangible property came to rest in Ohio, such items could have been subjected to the levy of a use tax on their value by the state prior to their incorporation into this data processing system. *Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939); *Pacific Telephone & Telegraph Co. v. Gallagher,* 306 U.S. 182 (1939). However, the State of Ohio has sought to tax more than the value of the terminals and other equipment located within Ohio prior to their connection to the data processing system. By assessing use tax on the gross monthly fee paid EDS by Union Central, the Tax Commissioner has attempted to tax both the value of the use of such property after its reintroduction into interstate commerce and the use of property outside of Ohio, i.e., the computers and programs in Texas.

The issue in the first instance is whether Ohio may define a transaction as not in interstate commerce where only a portion of the property involved has in fact come to rest within its borders. Here, the Ohio Supreme Court has erroneously equated nexus with the acquisition of local situs. Even though a transaction may have sufficient nexus with a state to validly support the imposition of tax, that transaction may still be in interstate commerce. *Maryland v. Louisiana,* 451 U.S. 725, 754-55 (1981); *Washington Revenue Dept. v. Washington Stevedoring Assn.,* 435 U.S. 734 (1978). Under the plain terms of a number of this Court's decisions, the present transaction is one in interstate commerce.

II

The Ohio Supreme Court Erred In Failing To Void The Assessment Of An Unapportioned Use Tax On Payments For Participation In An Interstate Data Processing System.

For a single monthly payment, Union Central obtained the right to use property both within and without Ohio. Union Central acknowledges that Ohio may levy a use tax on the value of the terminals, printers and operation manuals which came to rest in the state. However, the base charge was not limited to the provision of these items, but also covered the use of the computers and programs in Texas and it is the entire base charge which the Tax Commissioner has attempted to tax.

A state has the authority, of course, to tax a transaction which either is in interstate commerce or involves in part the usage of property in another state provided (1) the activity taxed has a substantial nexus with the taxing state, (2) the tax does not discriminate against interstate commerce, (3) the tax is related to the services provided by the state, and (4) *the tax is fairly apportioned. Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). By levying a tax on the gross fees paid EDS by Union Central, the Tax Commissioner has violated the fourth condition—the tax is not apportioned to the activities in the taxing state.

The rationale for the apportionment requirement as articulated by this Court is that, "[T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation." *General Motors Corp. v. Washington,* 377 U.S. 436, 440-41 (1964). This reflects both inherent limitations on the states' jurisdiction to tax and the necessity to protect interstate commerce from cumulative burdens from several

states. *Id. at 440; Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954); *Washington v. J.C. Penney Co.,* 311 U.S. 435, 444 (1940); *see also National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753, 756 (1967). Both concerns are violated by the determination of the Ohio Supreme Court.

First, an unidentifiable but substantial portion of the base fee represents a charge for usage of the computers and other equipment in Texas. Appendix A at A2. As the system is being operated in an on-line manner by Union Central employees in Ohio, the Tax Commissioner is attempting to tax the use of property located outside Ohio.[3] The fact that data is sent from Ohio to Texas, with the processed or stored data being retrieved to Ohio, in no way negates the apportionment requirement where there is also substantial out-of-state activity. *Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948).

Second, this Court consistently has held that the sole event sufficient to establish a constitutional nexus supporting the imposition of a use tax is the coming to rest within the taxing state of the tangible property associated with the tax. *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327 (1944); *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937); *see also Evco v. Jones,* 409 U.S. 91 (1972). The proposition may be raised that these decisions are qualified by *Complete Auto Transit.* Even so, if an unapportioned use tax may be levied on the gross fees paid for an interstate transaction where only a portion of the property utilized by the taxpayer came to rest within the taxing

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3. Though Union Central submits that federal standards control whether a transaction is in interstate commerce, under Ohio law, the provision of on-line data processing services via terminal connection to an off-premises computer is deemed a use of the computer subject to sales tax. *Citizens Financial Corp. v. Kosydar,* 43 Ohio St.2d 148, 331 N.E.2d 435 (1975); *cf. Bunker-Ramo Corp. v. Porterfield,* 21 Ohio St.2d 231, 257 N.E.2d 365 (1970).

state as determined by the Ohio Supreme Court, then the parties to such interstate transactions definitely would be exposed to the risk of multiple taxation. The possibility of multiple taxation is, by itself, a constitutional infirmity; actual multiple taxation need not be established. *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 444 (1980).

The local situs requirement for application of sales and use taxes, when applied to traditional modes of trade in goods, normally obviates the need for application of the apportionment requirement. That is, a sales or use tax cannot be levied on goods still moving in interstate commerce, only on goods acquiring a local situs; the requirement of apportionment only applies to transactions in interstate commerce. To the extent goods are moved from state to state, they may not be taxed so long as they continue in their journey, but they may be subjected to taxation at each juncture where they acquire a local situs. The present case, however, involves property being used in interstate commerce. Since the Ohio use tax statute contains no apportionment provision, it is Union Central's position that the statute is unconstitutional as applied to transactions in interstate commerce. The assessment is therefore void in its entirety.

The Tax Commissioner argued below that the payments were taxable for the reason that the data itself came to rest in Ohio. This position was apparently rejected by the Ohio Supreme Court as it chose instead to focus on the terminals coming to rest within the state as establishing a local situs for the transactions. The Tax Commissioner's position is plainly in error and was properly rejected by the Ohio Supreme Court for three reasons. First, what came back to Ohio was not simply a duplicate of the data in Texas. Data was stored in memory banks in Texas and Union Central either retrieved portions of the material stored there or created new material

based on those contents. The maintenance of these memory banks is an essential element in the on-line operation of the total data processing system by Union Central. Second, a substantial portion of the data was retrieved from Texas by Union Central employees using video terminals. The information was displayed as a television picture on the screen of the video terminal based on an electronic signal generated by the computers in Texas and sent over interstate telephone lines; there was no tangible property coming to rest within Ohio. Each month, Union Central employees conducted some 400,000 to 500,000 transactions with the computers in Texas using these video terminals. Third, even though a portion of the property came to rest in Ohio, there was still a substantial segment used in interstate commerce. The property in interstate commerce used by Union Central includes the computers, the telephone lines and the terminals. There is a continuous electric circuit, i.e., an open telephone line, between the Ohio terminals and the Texas computers by which data and commands are sent and received by Union Central employees.

The present case thus affords this Court the opportunity to specify the application of the apportionment requirements to sales and use tax cases as it has previously specified in gross receipts tax cases. *See, e.g., Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948); *Western Union Telegraph Co. v. Texas,* 105 U.S. 460 (1882). Because sales and use taxes are so similar in form and operation to gross receipts taxes, the decision of the Ohio Supreme Court now stands in irreconcilable conflict with a consistent line of decisions of this Court addressing the constitutional limitations on the levy of gross receipts taxes.

III

This Case Involves The Taxation Of New Technologies And As Such Is Of Concern To All States Imposing Sales And Use Taxes.

While the computer age has spawned substantial tax litigation at the state level,[4] this Court has yet to rule in a case applying the Constitution's strictures on taxation by the states to interstate data processing transactions. Though these constitutional strictures represent fundamental principles flexible enough to accommodate the treatment of new technologies, it is apparent from the decision of the Ohio Supreme Court that there is a present need for additional guidance from this Court.

This need for guidance in the taxation of interstate data processing is accentuated by the increasing commonality of such transactions. For years, businesses have made use of off-premises computers to process their own data, both under total system arrangements such as that involved in the present case and simple time sharing transactions.[5] Remote terminal access has been developed for such consumer uses as automatic teller banking machines and hotel and airline reservation systems. An off-shoot of remote processing is data base access through remote terminals. Some data bases, such as the Lexis and Westlaw systems, generally are accessed through vendor supplied hardware while others may be accessed with the user's own equipment. There are now over 3,000 data bases offered for subscription at rates varying from a few dollars to several hundred dollars per hour of access.[6] Still

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4. *See generally* Bigelow, *The Computer and the Tax Collector,* 30 Emory L. J. 357, 369-82 (1981).

5. Union Central, for example, first began its dealing with EDS in 1969; *see also* White, *Shared Computing,* 1 Rutgers J. of Computers and the Law 63, 68-69 (1970).

6. Lesko, *Low-cost On-line Data Bases,* Byte, Oct. 1984, at 167-74.

another development centers on networks allowing computers to communicate with each other. Increasingly, computer telecommunications are competing with both written and telephone communications.[7]

The review of the present case by this Court will have impact far beyond the immediate controversy. With respect to other taxpayers subject to Ohio law, the provision of data processing services was specifically exempted from sales and use taxation for a time by statutory amendment effective August 27, 1976. 1975-76 Ohio Laws 3794-99. However, this exemption was repealed and the sales and use taxes were affirmatively extended to data processing services effective July 1, 1983. 1983 Ohio Legis. Serv. 5-187, *et. seq.* (Baldwin), as amended by H.B. 794, 1984 Ohio Legis. Serv. 5-577 (Baldwin); *see also,* Opinion of the Ohio Supreme Court, note 1, in Appendix A at A3.

This new Ohio tax levy substantially mirrors the reach of the tax levied under the general sales and use tax statutes prior to the passage of the exemption provision. *Compare Financial Computer Services, Inc. v. Lindley,* 70 Ohio St.2d 243, 436 N.E.2d 1025 (1982), *and Accountant's Computer Services, Inc. v. Kosydar,* 35 Ohio St.2d 120, 298 N.E.2d 519 (1973), *with* Ohio Department of Taxation Statement to Data Processor or Computer Service Provider, July 1, 1983, reproduced as Appendix H at pages A35 through A38. If anything, this subsequent legislative action reaffirms the need for guidance from this Court with respect to the treatment of interstate transactions. In addition, forty-four other states and the District of Columbia impose sales and use taxes. ST. TAX CAS. (CCH) ¶60-001, -009. Given the widespread imposition of sales and use taxes coupled with the frequency of interstate

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7. *See generally* A. Lee, Electronic Message Transfer and Its Implications 5-30 (1983); Schiffres, *Talking By Computer Is a New Way of Life,* U.S. News & World Rep. Aug. 27, 1984, at 59-60.

data processing transactions similar to those at issue, a plenary consideration of the present case would establish much-needed guideposts for the states with respect to taxation in both the data processing area and also in the communications field.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction on appeal and set down this case for plenary consideration.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE OHIO SUPREME COURT

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

v.

LINDLEY, TAX COMMISSIONER,
Appellee.

[12 Ohio St.3d 80]

Taxation—Sales and use tax assessment as to development of programs, computer time, use of equipment, systems modifications and magnetic tape—"Sale," construed—R.C. 5739.01(B).

(No. 83-1679—Decided July 11, 1984.)

APPEAL from the Board of Tax Appeals.

This appeal arises out of a sales and use tax assessment issued against the appellant-taxpayer, The Union Central Life Insurance Company (hereinafter "Union Central").

Appellant is a mutual life insurance company with its home office in Forest Park, Ohio. In 1977 appellee, Tax Commissioner (hereinafter "commissioner"), issued the assessment which covered payments Union Central made

to Electronic Data Services Corporation (hereinafter "EDS") of Dallas, Texas pursuant to a contract for data processing services.

Under the terms of the agreement, EDS devised computer programs to meet the needs of Union Central. Title to the programs was retained by EDS. The programs were managed from the facilities of EDS in Dallas where the computer was located.

In order to gain access to the system, appellant was provided with video screen terminals and high-speed printers which were linked to the computer via telephone lines. In addition, appellant's employees were trained to operate such equipment by personnel from EDS. The equipment was owned and serviced by EDS which also provided operating manuals for the system.

The assessment covered three types of expenditures made by Union Central. A substantial portion of the assessment was on a base charge for the development of programs, computer time, and use of equipment. The second charge centered on payment for systems modification requests made by appellant to accommodate changes in its operating procedures. The last type of expenditure was a charge to cover appellant's share of the magnetic tape which was used by EDS at its Dallas computer center.

The Board of Tax Appeals affirmed the commissioner's assessment against Union Central.

The cause is now before this court upon an appeal as of right.

Messrs. Frost & Jacobs, Mr. Dennis J. Barron and *Mr. Larry H. McMillin,* for appellant.

Mr. Anthony J. Celebrezze, Jr., attorney general, and *Mr. James C. Sauer,* for appellee.

Per Curiam. The issue presented is whether the specific transactions between appellant and EDS are subject to a use tax under R.C. 5741.02. We hold that the ruling of the Board of Tax Appeals was reasonable and lawful as to that portion of the assessment which concerned the development of programs, computer time, and use of equipment. However, the expenditures for systems modifications and magnetic tape are not subject to taxation under the laws of this state.

R.C. 5741.02 authorizes the levy of a use tax on the storage, use, or other consumption of tangible personal property which, if purchased in Ohio, would be a sale subject to sales tax under R.C. Chapter 5739. Thus, in order to initially determine whether the use tax assessment was valid in the case *sub judice,* we must look to the definition of "sale" within R.C. Chapter 5739.

At the time of the assessment, R.C. 5739.01(B) stated in pertinent part:

" 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred * * * for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever; * * *. Other than as provided in this section, 'sale' and 'selling' do not include professional, insurance, or personal service transactions which involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made."[1]

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1. This *statute* has subsequently been amended to include the rendering of automatic data processing and computer services within the definition of "sale." R.C. 5739.01(B)(3)(e).

Appellant contends that the business dealings sought to be taxed were personal service transactions which involved a transfer of tangible personal property as an inconsequential element thereof. We reject this argument.

In *Accountant's Computer Services* v. *Kosydar* (1973), 35 Ohio St. 2d 120 [64 O.O.2d 72], this court had the opportunity to thoroughly interpret R.C. 5739.01(B). In adjudicating whether a "sale" of tangible personal property may be excepted from sales tax under the statute, we held the proper test is to determine whether the transaction involves a consequential or inconsequential professional, insurance, or personal service. If a consequential service is rendered, then it must be ascertained whether the transfer of tangible personal property was an inconsequential element of the transaction. *Id.* at paragraph one of the syllabus.

We further ruled in *Accountant's Computer, supra,* that to resolve whether a mixed transaction constitutes a consequential personal service transaction, a determination must be made as to the true object of the contract. Specifically, it must be adjudged if the true object sought by the buyer was the service or the property produced by the service. *Id.* at paragraph two of the syllabus. See, also, *Financial Computer Services* v. *Lindley* (1982), 70 Ohio St. 2d 243 [24 O.O.3d 336]; *Citizens Financial Corp.* v. *Kosydar* (1975), 43 Ohio St. 2d 148 [72 O.O.2d 83].

It is not questioned that consequential services were rendered in the case at bar. However, the use of terminals, printers, and operation manuals were substantially more than inconsequential elements of the contract. Union Central would not have the benefit of the programs designed by EDS if its employees did not have the equipment necessary to gain access to the system. The programs would simply be of no value to appellant without the equipment. Therefore, we find that such tangible personal property, if purchased in Ohio, would be a sale subject to sales tax under R.C. Chapter 5739.

Appellant also contends that because the computer is located in Texas and communication is effected through interstate phone lines, the use tax is prohibited by R.C. 5741.02(C)(3) and Section 8, Article I of the United States Constitution.

R.C. 5741.02(C) at the time of the assessment provided in part:

"The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

"* * *

"(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state * * *."

Section 8, Article I of the United States Constitution grants Congress the exclusive power to regulate commerce among the states and thereby prohibits a state from imposing a direct burden on interstate commerce. However, we have recognized that the provision is not an absolute bar to state taxation which has merely an incidental effect upon interstate commerce.

In *Federal Paper Board Co.* v. *Kosydar* (1974), 37 Ohio St. 2d 28, 32 [66 O.O.2d 82], the court stated that "[s]tate use tax statutes have been consistently upheld by the United States Supreme Court in their application to tangible personal property where the property was carried into the taxing state,

and there brought permanently to rest, or halted temporarily before resuming its interstate course or usage. *Scripto* v. *Carson* (1960), 362 U.S. 207; *General Trading Co.* v. *State Tax Comm.* (1944), 322 U.S. 335; *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U.S. 359; *McGoldrick* v. *Berwind-White Mining Co.* (1940), 309 U.S. 33; *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939), 306 U.S. 62; *Pacific Telephone & Telegraph Co.* v. *Gallagher* (1939), 306 U.S. 182; *Southern Pacific Co.* v. *Gallagher* (1939), 306 U.S. 167; *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577." See, also, *Beatrice Foods Co.* v. *Lindley* (1982), 70 Ohio St. 2d 29 [24 O.O.3d 68].

It is also established that the assessment of a use tax is valid under the Commerce Clause where the property in question has temporarily come to rest in the jurisdiction and the taxpayer has exercised some right of ownership over the property. *Federal Paper Board Co., supra,* at 34-35; *Southern Pacific Co., supra; Henneford, supra; Tri-City Broadcasting Co.* v. *Bowers* (1959), 169 Ohio St. 126 [8 O.O.2d 118].

Appellant relies on *General Data Corp.* v. *Porterfield* (1970), 21 Ohio St. 2d 223 [50 O.O.2d 468], in support of its argument that the computer system herein was used in interstate commerce. In that case the court held that a use tax levied on the rental of computer terminals installed in motels for use in an international reservation system was prohibited by Section 8, Article I of the United States Constitution. However, in so holding, this court at 228 noted that the use tax was assessed on a rental charge for utilization of the reservation system rather than the terminals. Thus, the tax was not levied on the property which came to rest in this state, but on the rental charges therefor.

In the case *sub judice,* the terminals and other items which comprise the base charge were not used to further interstate commerce and the tax was not assessed on the utilization of the system as in *General Data Corp., supra.* These

items were used for Union Central's business which is limited to Ohio. Furthermore, the terminals, upon arrival and installation, were at rest in Ohio and put to use solely in this state. Therefore, we hold that the base charge for the development of programs, computer time, and use of equipment was a transaction subject to use tax.

While we affirm the decision of the Board of Tax Appeals as to the base charge, we must reverse that portion of the board's ruling which relates to the systems modification requests and magnetic tape. The latter charges did not include any transfer of property to Ohio. The modification requests were for the design of program changes which was purely a service. Any tangible product which resulted from such requests would be limited to the device used for recording the program which is located in Texas. Similarly, the magnetic tape did not reach Ohio as it was used only in Texas.

Based on the foregoing, the decision of the Board of Tax Appeals is affirmed in part and reversed in part.

Decision affirmed in part and reversed in part.

CELEBREZZE, C.J., O'NEILL, SWEENEY, LOCHER, HOLMES, C. BROWN and J. P. CELEBREZZE, JJ., concur.

O'NEILL, J., of the Seventh Appellate District, sitting for W. BROWN, J.

APPENDIX B

DECISION AND ORDER OF THE BOARD OF TAX APPEALS OF THE STATE OF OHIO

(Entered October 4, 1983)

BOARD OF TAX APPEALS
STATE OF OHIO

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

vs.

EDGAR L. LINDLEY, TAX COMMISSIONER OF OHIO,
Appellee.

CASE NO. 81-D-597
(SALES AND USE TAX)

DECISION AND ORDER

Counsel for Appellant—DENNIS J. BARRON, Esq.,
LARRY H. MCMILLIN, Esq.,
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Counsel for Appellee— ANTHONY J. CELEBREZZE, JR., Esq.,
Attorney General of Ohio
JAMES C. SAUER, Esq.,
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30 East Broad Street
Columbus, Ohio 43215

An appeal, pursuant to R.C. 5717.02, from a final determination of the Tax Commissioner.

On September 25, 1981, a notice of appeal on behalf of The Union Central Life Insurance Company ("Appellant") was filed and docketed by this Board, the body of which reads:

"1. Appellant, The Union Central Life Insurance Company (hereinafter "Union Central"), hereby gives notice of its appeal to the Board of Tax Appeals, State of Ohio, from the final determination and order of the Tax Commissioner of the State of Ohio dated August 27, 1981, in the matter of Sales and Use Tax Assessment, Serial No. 7717954. A copy of this final determination and order, embodied in Journal Entry of the Tax Commissioner dated August 27, 1981, is attached hereto, marked 'Exhibit A' and incorporated herein.

"2. The final determination of the Tax Commissioner as to Union Central's transactions with Electronic Data Service ("EDS") of Dallas, Texas set forth on pages 38 through 43 of the Statutory Transcript is erroneous and contrary to law in that the assessment as revised by the Tax Commissioner's Journal Entry attached hereto includes $166,591.26 in use tax on those transactions.

"3. The final determination of the Tax Commissioner is erroneous and contrary to law for the reason that it failed to find that Union Central's transactions with EDS were not sales within the meaning of Revised Code §5739.01(B), but rather were professional or personal service transactions involving the transfer of tangible personal property as an inconsequential element thereof, and therefore exempt from use tax under Revised Code §5741.02(C)(2).

"4. The finding of the Tax Commissioner that the ultimate object of Union Central's transactions with EDS

was to enable EDS to sell Union Central's own data back to it in systematic form is erroneous, unsupported by the Statutory Transcript, and contrary to law.

"5. The final determination of the Tax Commissioner is erroneous and contrary to law for the further reason that it is premised on the assumption that data processing transactions were subject to sale and use tax during most of the audit period.

"6. The final determination of the Tax Commissioner is erroneous and contrary to law for the reason that it failed to find that Union Central's transactions with EDS were not sales within the meaning of Revised Code §5739.01(B), but rather were insurance service transactions involving the transfer of tangible personal property as an inconsequential element thereof, and therefore exempt from use tax under Revised Code §5741.02(C)(2).

"7. The finding of the Tax Commissioner that the personal services expended by EDS were not directed at developing the insurance company business of Union Central is erroneous, not supported by the Statutory Transcript and contrary to law.

"8. The failing of the Tax Commissioner to find that Union Central's transactions with EDS were in interstate commerce is erroneous, not supported by the Statutory and contrary to law.

"9. The finding of the Tax Commissioner that Union Central merely obtained the results of computer operation from EDS personnel is erroneous, not supported by the Statutory Transcript and contrary to law.

"10. The final determination of the Tax Commissioner is erroneous and contrary to law for the reason that it failed to find that Union Central's transactions with EDS were

exempt from taxation under Revised Code §5741.02(C)(3), in that the State of Ohio is prohibited from taxing these transactions by the commerce clause of Article I, Section 8 of, and the due process clause of the fourteenth amendment, to the United States Constitution.

"11. The final determination of the Tax Commissioner is erroneous and contrary to law for the reason that the assessment of use tax on Union Central's transactions with EDS while knowingly and deliberately not assessing sales and/or use tax on similar transactions undertaken by other taxpayers is an abuse of discretion and contrary to the equal protection clause of the fourteenth amendment of the United States Constitution and the equal protection clause of §26 of Article II of the Ohio Constitution.

"12. The final determination of the Tax Commissioner is erroneous and contrary to law for the reason that the Tax Commissioner failed to consider Union Central's objections to the assessment of System Modification Request charges made by EDS as identified in an exhibit submitted by Union Central at the hearing on its Petition for Reassessment, which transactions were not sales within the meaning of Revised Code §5739.01(B), but rather were professional or personal services transactions involving the transfer of tangible personal property as an inconsequential element thereof, and therefore exempt from use tax under Revised Code §5741.02(C)(2).

"13. The final determination of the Tax Commissioner is erroneous and contrary to law for the reason that the Tax Commissioner failed to consider Union Central's objections to the assessment of a magnetic tape reimbursement fee as set forth in the memorandum filed with the Tax Commissioner by Union Central in support of its Petition for Reassessment which transactions [sic] was exempt from taxation under Revised Code §5741.02(C)(3), in that the State of Ohio is

prohibited from taxing such transaction by the commerce clause of Article I, Section 8 of, and the due process clause of the fourteenth amendment to, the United States Constitution.

"14. The final determination of the Tax Commissioner not to remit the 15% statutory penalty in full is erroneous and an abuse of discretion. The failure of the Tax Commissioner to either state the reasons for his conditional partial remission of the penalty or to promulgate standards governing the remission is additionally an abuse of discretion and contrary to the equal protection and due process clauses of the fourteenth amendment to the United States Constitution.

"15. Attached hereto, marked "Exhibit B" and incorporated herein is a summary of the taxes and penalties assessed, those remitted and those subject to appeal along with a summary of the payments of tax made by Union Central.

"16. Union Central respectfully requests the Board of Tax Appeals to reverse, vacate and set aside that portion of the decision of the Tax Commissioner herein appealed from as unlawful and enter its order finding that the items referred to herein are not subject to use tax, and that Sales and Use Tax Assessment Section No. 7717954 is erroneous and unlawful in the respects set forth herein.

"Dated this 25th day of September, 1981."

On November 4, 1981, the Tax Commissioner certified to this Board a transcript of the record of the proceedings before that official, together with all evidence considered by such official ("ST."), as prescribed by R.C. 5717.02.

On May 20, 1982, pursuant to assignment and notice given thereof, the cause came on for the hearing of any additional evidence. Both parties appeared through counsel. A transcript of the hearing proceeds was subsequently prepared and filed ("Tr."). Briefs were also submitted by counsel.

The evidence adduced before the Board consisted primarily of the testimony of two witnesses and related exhibits.

The primary issue herein is whether the transactions in question are exempt from taxation by virtue of R.C. 5739.01(B), which reads, in part:

" 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted; * * *. Other than as provided in in [sic] this section, 'sale' and 'selling' do not include professional, insurance, or personal service transactions which involve the transfer of tangible personal property as an inconsequential element, for which no separate charges were made."

The "true object" of the transactions being sought by the Appellant was the hard copy print-outs and video print-outs from Electronic Data Services Corporation ("EDS").

In substance and effect, the personal services performed by EDS personnel were primarily for the purpose of EDS's programming of its integrated data processing equipment so as to accept the Appellant's business information, to convert the same into computer language, and to return the Appellant's own data in various print-out forms for Appellant's subsequent use in conducting its insurance business; any "advice" given by EDS to the Appellant was only incidental and subservient to EDS's computer programming and computer processing activities.

The activities here involved (integrated data processing services and programming) are substantially identical to the activities considered and held taxable in *Citizens Financial Corp.* v. *Kosydar* (1975), 43 Ohio St. 2d 148. See also, *Financial Computer Services* v. *Lindley* (1982), 70 Ohio St. 2d 243;

Lindner Bros. v. *Kosydar* (1976), 46 Ohio St. 2d 162; *Accountant's Computer Services* v. *Kosydar* (1973), 35 Ohio St. 2d 120.

From the record, it is further evident that the print-outs are provided the Appellant in Ohio and used by the Appellant as part of its Ohio business activities, and subject to Ohio use tax; R.C. Chapter 5741.

Appellant also contends that the assessment includes the taxing of transactions beyond the taxing power of the State of Ohio.

R.C. 5741.02, reads, in part:

"(C) The tax does not apply to the storage use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible prsonal [sic] property purchased under the following described circumstances:

"* * *

"(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. *This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state.* * * *."

(emphasis added)

The assessment of use tax on the Appellant's receipt and use in Ohio of the product of data processing, i.e., the print-out data and the true object purchased by the subject transactions here involved and produced in Ohio, even though the vendor, EDS, maintains and uses its computer located outside of Ohio in producing the subject print-out information,

data and reports, does not preclude the taxation of such tangible personal property when delivered and used in this State. R.C. 5741.02(C)(3).

The record indicates that EDS installed its own hardware at Union Central on which to run its programs. EDS's equipment was located in an area which EDS leased from Union Central (Tr.80). EDS leases space in the Union Central building at Cincinnati, Ohio were [sic] it performs data processing for Union Central. EDS has its own equipment located in Union Central and has its own employees working in the building (ST.162). The print-put [sic] information may be obtained by EDS through use of its integrated computer system, part of which is located outside of Ohio, but the end product, i.e., the print-outs are nevertheless transferred from EDS to the Appellant in this state. The constitutional limitations, to which the Appellant refers, have no application to the subject transactions here involved.

With respect to the penalty applied to the subject assessment, the 15% penalty applied is prescribed by statute. The Tax Commissioner's conditional remission to 5% is also authorized by statute. See, R.C. 5741.14 and R.C. 5739.13. Appellant does not question the statutory application of such provisions to the subject assessment. Appellant only contends that the Tax Commissioner has failed to establish clearly defined standards with reference to such remission authority and the Appellant, therefore, has no means to determine whether the Tax Commissioner abused his discretion in not remitting the penalty in full.

Before this Board can order a remission of a penalty imposed by the Tax Commissioner, it must affirmatively find that the Tax Commissioner abused his discretion in refusing to remit the penalty. The Appellant has failed to establish on the record that the Tax Commissioner abused his discretion in this instance. See, *State, ex rel Shafer* 159 Ohio St. 581, 590;

Interstate Motor Freight System v. *Bowers* (1960), 170 Ohio St. 483; *State, ex rel. Sheppard* v. *Koblenz* (1962), 174 Ohio St. 120.

The Board of Tax Appeals finds and determines, upon the record and as a matter of law, that the Tax Commissioner's final determination is reasonable and proper in all respects and that the Appellant's specifications of error are without merit.

IT IS ORDERED that the Tax Commissioner's final determination, rendered by Journal Entry, dated August 27, 1981, here involved, should be, and hereby is, affirmed.

IT IS FURTHER ORDERED that a certified copy of this decision and order be sent to the Tax Commissioner, and to each of the parties hereto by and through their respective counsel.

APPENDIX C

JOURNAL ENTRY OF THE TAX COMMISSIONER OF OHIO

(Entered August 27, 1981)

STATE OF OHIO
DEPARTMENT OF TAXATION

In the matter of Sales and Use Tax Assessment,
Serial No. 7717954

THE UNION CENTRAL LIFE INSURANCE COMPANY
P.O. Box 179
Cincinnati, Ohio 45201

Vendor's License No. 31-138305
Consumer's Use Tax Account No. 97-111283

JOURNAL ENTRY

The Tax Commissioner came to consider the above styled matter at a hearing at Cincinnati, Ohio, on July 27, 1978. DENNIS J. BARRON and LARRY H. MCMILLAN, Attorneys at Law with Frost & Jacobs, 2500 Central Trust Center, Cincinnati, Ohio, appeared at the hearing on behalf of the petitioner.

Now, being fully advised thereon, the Commissioner finds that:

This assessment is the result of an audit of the petitioner's sales over the period from October 1, 1973, through September 30, 1976, and its purchases over the period from July 1, 1973, through September 30, 1976. The petitioner objected to a large portion of the assessment and filed a petition for reassessment. The objections are disposed of as follows.

Data Processing Charges

The taxpayer has several alternative arguments to advance its contention that these transactions are not subject to the Ohio use tax. It contends first that the transactions were essentially personal service transactions with no consequential transfers of tangible personal property. It described at length the types of services rendered by its data processor to show this. Although the processor has been shown to have used considerable expertise in developing programs for use in the taxpayer's accounting system, the ultimate object of the development of the sophisticated data processing system was to enable the processor to sell the taxpayer's own data back to it in systematic form. Since such data transactions were subject to the sales and use taxes during most of the audit period, the services devoted to developing the system are part of the overhead costs of that processed data. The objection is denied.

The taxpayer also argues that these were primarily insurance service transactions that, under Section 5739.01(B) of the Revised Code, are considered not to be subject to the tax. It contends that "insurance services" include transactions in support of the insurance industry. The service involved in these transactions, however, was not directed at developing the insurance business of the taxpayer but at developing methods

that would coordinate well with the system used to process accounting data for the taxpayer. This is too far removed from the apparent meaning of Revised Code Section 5739.01(B). The objection is denied.

The taxpayer also contends that these transactions were in interstate commerce under the interpretation in *General Data Corp.* v. *Porterfield* (1970), 21 Ohio St. 2d 223 due to the actual processing occurring to a large extent in Texas. However, the taxpayer does not operate the computers; it merely obtains the results of the processing from the processor's personnel in Ohio. The objection is denied.

Reports

The taxpayer purchased different types of reports in the course of conducting its insurance business. It contends that certain types of medical reports on policy holders were essentially personal service transactions as were reports on the possibility of fraud being devised by applicants making sudden large purchases of insurance. The objection is allowed as to the medical reports. Deduct $2,038.65 in use tax. The second type of reports are not developed on an individual basis but are contained in a publication generally available to the insurance industry. The objection as to them is denied.

Rate Books

The taxpayer contends that a portion of the purchases of rate books from an out of state supplier never entered the state and is therefore not subject to the use tax. The objection is allowed. Deduct $1,015.09 in use tax.

Permissive Use Tax

Under the decision in *American Modulars Corp.* v. *Lindley* (1978), 54 Ohio St. 2d 273, the permissive use tax not removed in the preceding paragraphs is hereby ordered deducted in the amount of $21,343.29.

Adjustments made in the preceding paragraphs total $24,397.03 in use tax.

The request for remission of the penalty is allowed in part conditionally as noted.

Therefore, it is the order of the Tax Commissioner that if payment of

	Assessment	Penalty	Total
(Sales Tax)	$ 5,663.08	$ 283.15	$ 5,946.23
(Use Tax)	170,746.34	8,537.32	179,283.66
	Total Sales and Use Tax		$185,229.89

is made within thirty (30) days after receipt by the taxpayer of this journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals, to an appropriate Court of Appeals, or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

If the total amount is not paid as above provided, the assessment shall stand as adjusted in the following amounts:

	Assessment	Penalty	Total
(Sales Tax)	$ 5,663.08	$ 849.46	$ 6,512.54
(Use Tax)	170,746.34	25,611.95	196,358.29
	Total Sales and Use Tax		$202,870.83

The law provides that the unpaid amount of tax shall bear interest at the rate of six percent per annum from May 26, 1977 to the date of payment.

/s/ EDGAR L. LINDLEY
Edgar L. Lindley
Tax Commissioner

APPENDIX D

JUDGMENT ENTRY OF THE OHIO SUPREME COURT

(Entered July 11, 1984)

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

vs.

EDGAR L. LINDLEY, TAX COMMISSIONER,
Appellee.

No. 83-1679

APPEAL FROM THE BOARD OF TAX APPEALS

This cause, here on appeal from the Board of Tax Appeals, was heard in the manner prescribed by law. On consideration thereof, the decision of the Board of Tax Appeals is affirmed in part and reversed in part for the reasons stated in the opinion herein.

It is ordered that a mandate issue to the Board of Tax Appeals to carry this judgment into execution.

APPENDIX E

ENTRY DENYING REHEARING BY THE OHIO SUPREME COURT

(Entered September 12, 1984)

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

vs.

EDGAR L. LINDLEY, TAX COMMISSIONER,
Appellee.

No. 83-1679

REHEARING

It is ordered by the court that rehearing in this case is denied.

APPENDIX F

NOTICE OF APPEAL

(Filed October 29, 1984)

No. 83-1679

IN THE SUPREME COURT OF OHIO

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

vs.

EDGAR L. LINDLEY,
TAX COMMISSIONER OF OHIO,
Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Union Central Life Insurance Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Ohio entered in this proceeding on September 12, 1984, denying the Motion for Reconsideration of The Union Central Life Insurance Company with respect to that portion of the opinion and order of this Court entered July 11, 1984, and also from that portion

of said order of this Court entered July 11, 1984, which affirmed in part the decision and order of the Board of Tax Appeals of the State of Ohio entered October 4, 1983, with respect to the final determination of the Tax Commissioner of Ohio in an assessment of Use Tax claimed to be due and owing the State by The Union Central Life Insurance Company.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ DENNIS J. BARRON
Dennis J. Barron

/s/ LARRY H. MCMILLIN
Larry H. McMillin

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CERTIFICATE OF SERVICE

Larry H. McMillin, co-counsel for Appellant The Union Central Life Insurance Company, hereby affirms and certifies that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served by mailing a true copy thereof to the

Appellee's attorneys, Anthony J. Celebrezze, Jr., Attorney General, and James C. Sauer, Assistant Attorney General, at the Office of the Attorney General—Taxation Division, State Office Tower—16th Floor, 30 East Broad Street, Columbus, Ohio 43215, by depositing said copy in the United States mail, first class postage prepaid, the 29th day of October, 1984.

/s/ LARRY H. MCMILLIN
Larry H. McMillin
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

United States Constitution Art. I, §8, Cl. 3 (Commerce Clause):

ARTICLE I

> Section 8. The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . .

United States Constitution Amendment XIV, §1 (Due Process Clause):

AMENDMENT XIV

> Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Statutes

Ohio Revised Code §5739.01:

As used in Sections 5739.01 to 5739.31 of the Revised Code:

* * *

> (B) "Sale" and "selling" include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted. . . .

As stated throughout amendments by 1967-68 Ohio Laws 1981-85, 1973 Ohio Laws 514-18 and 898-902, 1974 Ohio Laws 198-202 and 493-498, and 1975-76 Ohio Laws 1366-71 and 3445-50.

Ohio Revised Code §5739.02:

> For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crises, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering Sections 5739.01 to 5739.31 of the Revised Code, an excise tax is hereby levied on each retail sale made in this state.
>
> * * *

As stated throughout amendments by 1971-72 Ohio Laws 1575-79, 1973 Ohio Laws 902-906 and 1116-1120, and 1974 Ohio Laws 202-06 and 1252-57.

Ohio Revised Code §5741.01:

As used in Sections 5741.01 to 5741.22 of the Revised Code:

* * *

> (B) "Storage" means and includes any keeping or retention in this state for use or other consumption in this state.
>
> (C) "Use" means and includes the exercise of any right or power incidental to the ownership of the thing used.
>
> (D) "Purchase" means acquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession, or of both, or a license to use

or consume; whether such transfer was absolute or conditional, and by whatever means the same was effected; and whether the consideration was a price, rental in money, or exchange. . . .

* * *

(F) "Consumer" means any person who has purchased tangible personal property for storage, use, or other consumption in this state.

(G) "Price" means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, by a consumer to a seller in the complete performance of the transaction by which tangible personal property has been purchased for storage, use, or other consumption in this state, without any deduction on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense. . . .

* * *

As stated throughout amendments by 1967-68 Ohio Laws 2031-33, 1974 Ohio Laws 516-520, and 1975-76 Ohio Laws 1374-76.

Ohio Revised Code §5741.02:

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property. . . .

(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided that the consumer shall be relieved from further liability for the tax if the tax has been paid to a seller

in accordance with Section 5741.04 of the Revised Code or prepaid by the seller in accordance with Section 5741.06 of the Revised Code.

(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

(1) When the sale of property in this state is subject to the excise tax imposed by Sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Tangible personal property, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by Sections 5739.01 to 5739.31 of the Revised Code;

(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state. . . .

As stated throughout amendment by 1971-72 Ohio Laws 1468-70, and 1974 Ohio Laws 518-520.

APPENDIX H

OHIO DEPARTMENT OF TAXATION STATEMENT

STATE OF OHIO
DEPARTMENT OF TAXATION
State Office Tower
P.O. Box 530
Columbus, Ohio 43216

July 1, 1983

Dear Data Processor or Computer Service Provider:

The 115th Ohio General Assembly has enacted Sub. H.B. 291 which became effective July 1, 1983. This enactment amends the definition of "sale" and "selling" in the sales tax law to include automatic data processing and computer services that are or are to be provided for use in business [Section 5739.01 (B)(3)(e) Ohio Revised Code]. The following outlines the parameters of those service transactions now subject to the Sales and Use Tax:

A. All charges for services where the data belonging to others is processed are subject to sales/use tax. These services include, but are not limited to: payroll preparation, accounting reports, sales analysis, financial reports, etc.

B. Charges for direct access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment. These services include, but are not limited to: computer time sharing, on-line charges, access fees, or any other usage fee.

C. All charges relative to the sale, modification, designing, or debugging of custom programs or other software. These services include all software related charges, but does not include the price for a canned (no modification) software program. Canned programs are considered tangible personal property and subject to sales tax under previously existing statute.

D. All charges relative to consultation, systems analysis, training services, and adjustments provided in conjunction with the sale, lease or operation of *taxable* computer equipment or systems. These charges include, but are not limited to the assistance rendered a customer in training his employees to operate new equipment; the charges for technical adjustments to fine tune computer equipment; analysis of customers needs and any consultation charges related thereto.

(Section 5739.01 (Y) Ohio Revised Code)

All sales of automatic data processing and computer services are presumed to occur at the location where the service is performed or received, normally the *consumer's* place of business. Tax must be collected at the rate in effect in the county where the consumer is located. (Section 5739.02, .021, and .023 Ohio Revised Code)

The existing exemptions in the sales and use tax laws also apply to sales of automatic data processing and computer services. Examples of such exemptions are: sales to the federal government, the state and its political subdivisions, to churches and nonprofit organizations operated exclusively for charitable purposes, interstate commerce, to persons using such services directly in manufacturing, processing, or assembling for sale, etc. Vendors of automatic data processing and computer services are also afforded statutory exemptions for those materials purchased for resale (rental) or

primarily for direct use in processing for sale or in making retail sales of automatic data processing or computer services (Sections 5739.01 and 5739.02 Ohio Revised Code). (Note: All referenced sales of automatic data processing and computer services are subject to application of the sales tax unless a statutory reason exists for their exemption in which case a properly executed exemption certificate must be obtained by the seller.)

Automatic data processing and computer services transactions that occur between members of an affiliated group are not sales, therefore the sales or use tax does not apply. Affiliated group is defined to mean two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations, one corporation owns or controls another if it owns more than fifty percent of the other corporation's common stock with voting rights.

[Section 5739.01 (B)(3)(e) Ohio Revised Code]

Sales of any of the referenced services to persons not engaged in business are not affected by the taxing provisions of H.B. 291.

All vendors of automatic data processing and computer services must make application, on the form provided, to the Tax Commissioner for a Service Vendor's License. The charge for the license is $25.00 with a $10.00 annual renewal fee. The license is not restricted to use in one county, but is valid for every county in the state. It is available only from the Department of Taxation. Applications may be obtained from any of our district offices located in Columbus, Akron, Cleveland, Cincinnati, Dayton, Lima, Toledo, Youngstown, and Zanesville. It may also be obtained by writing to the Department of Taxation, License Unit, P.O. Box 530, Columbus, Ohio 43216. [Section 5739.17 (C) Ohio Revised Code]

Persons located outside the state of Ohio who are providing automatic data processing and computer services to Ohio businesses are required to register with this department as an out-of-state provider and as such be appropriately licensed to collect and remit the proper tax due.

Returns will be furnished by this department and must be filed on a monthly basis. Detailed information will be supplied after the Service Vendor's License is obtained.

Any persons presently holding a regular vendor's license and providing services as covered by this new legislation will also be required to obtain the new Service Vendor's License. Sales of tangible personal property and repair and installation services must be separately reported from sales of automatic data processing and computer services due to statutory requirements regarding sales situs.

If you need further information please contact any of the district offices previously mentioned or the Department of Taxation, Sales Tax Unit, P.O. Box 530, Columbus, Ohio 43216, Telephone (614) 466-7350.

(2)

CASE NO. 84–918

Office-Supreme Court, U.S.
FILED
JAN 17 1985
ALEXANDER L. STEVAS,
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1984

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Appellant,

v.

JOANNE LIMBACH, TAX COMMISSIONER OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

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ATTORNEYS FOR APPELLEE

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QUESTION PRESENTED

Whether the appeal presents a substantial federal question or one that could not be resolved adequately on a nonfederal basis.

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STATEMENT OF CASE

This case originated in the Ohio Board of Tax Appeals as the result of an appeal by the Union Central Life Insurance Company (also referred to as UCL) from a final order affirming a sales and use tax assessment. The bulk of the assessment was on payments to the Electronic Data Services Corporation (EDS). In rejecting the appellant's objections to the assessment, the Tax Commissioner had found that the ultimate object of the transaction was to obtain processed data for use in Ohio, and that such property was in fact received and used in Ohio so as to be subject to the use tax. The appeal to the Board of Tax Appeals disputed this determination.

At the Board an evidentiary hearing was held and briefs were filed by the parties. The record revealed that the appellant is a mutual life insurance company organized in 1867. Since 1969 the appellant has had a contract with EDS for what it calls "facilities management." Facilities management was a concept in which a data-processing company assumes responsibility for a broad range of the data-processing needed by a company. The effort by EDS in this regard occurred in three stages. First, it defined the needs of the appellant as a customer. This often included advising the appellant as to the capabilities of its systems. The second stage was the actual design of systems or programs to meet the appellant's needs. The third stage was operational and included the installation, maintenance and possible modification of systems.

The EDS computer is located in Dallas, Texas. Video screen terminals, hard-copy terminals, and high-speed printers were placed in the appellant's facilities in

Forest Park, Ohio, and were hooked up to the computer via telephone lines. Employees of EDS maintain this equipment and actually operate the high-speed printers. The appellant has no employees in Dallas, and its only contact with EDS is in Forest Park, Ohio. Processed data is received by the appellant either as print-out on the video screen terminals or as print-outs from the hard-copiers and the high-speed printers, all located in Forest Park. These machines are used to print information letters for policy-holders and also premium bills.

On October 4, 1983, the Board issued a Decision and Order in which it affirmed the assessment. In doing so the Board found that the transactions in question were for data-processing with the true object being the hard-copy print-outs and video print-outs that were the product of such processing. The Board also found that such print-outs were received and used by the appellant in Ohio and were, therefore, properly the subject of the use tax.

Thereafter, on October 28, 1983, UCL filed a notice of appeal to the Ohio Supreme Court. Pursuant to the rules of that court the matter was briefed and oral arguments were heard. On July 11, 1984, the Ohio court issued an opinion and decision in which it affirmed the assessment of use tax on the base charge paid by the appellant. The appellant subsequently filed a Motion for Reconsideration, but it was denied on September 13, 1984.

On October 29, 1984, the appellant filed with the Ohio Supreme Court a notice of appeal to the United States Supreme Court. The appeal was docketed in the United States Supreme Court on December 7, 1984. The appellant has also served its jurisdictional statement

on the appellee. It was received by the appellee on December 10, 1984. The appellee now files this Motion to Dismiss or Affirm for the reason that the appellant has failed to set forth a substantial federal question and the judgment rests on an adequate nonfederal basis.

ARGUMENT

I. THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION, BUT RATHER A DISPUTE AS TO THE FACTUAL AND LEGAL CHARACTER OF THE ASSESSMENT AND THE TRANSACTION TO WHICH IT RELATES. SUCH DISPUTE HAS ALREADY BEEN DECIDED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

The appellant has based its claim of jurisdiction on its contention that the Ohio court has upheld an assessment on an interstate activity in violation of the commerce clause of the United States Constitution. The appellant asserts that the Ohio court applied an overly broad definition of intrastate commerce in affirming the assessment, and it characterizes the issues it raises as not having been previously addressed in the context of computer technologies. Thus, it reasons that the case is a proper one for review by this Court. For the reasons that follow the appellee submits that this appeal does not present a substantial federal question, but rather a dispute as to the factual and legal character of the assessed transactions, a dispute which can and has been resolved by reference to state law, consistent with the federal law.

Initially, it should be noted that data-processing transactions such as the one in issue have been held to constitute sales of the processed data under Ohio law. Compare *Accountant's Computer Services v. Kosydar* (1973), 35 Ohio St. 2d 120, 298 N.E. 2d 519; *Financial Computer Services, Inc. v. Lindley* (1982), 70 Ohio St. 2d 243, 436 N.E. 2d 1025. In the instant case it was undisputed that the assessed base charge was for what the appellant itself termed "facilities management," an arrangement by which EDS undertook a wide range of activities including the development of programs and the maintenance and operation of a computer to actually perform the data-processing needed by the appellant. EDS also installed and maintained various terminals in the appellant's Ohio office to enable the appellant's employees to request and obtain the results of such processing as needed. It was, therefore, both reasonable and lawful for the Board of Tax Appeals to determine that the true object of the appellant in the assessed transactions was the receipt..and use in Ohio of the processed data, and that such use was subject to assessment under R.C. 5741.02.

Likewise, the assessment was consistent with federal law and did not violate the commerce clause as an assessment on an interstate activity. In this regard it may be pointed out that the commerce clause itself is found in Article I, Section 8, Clause 3, Constitution of the United States, and reserves to Congress the power to regulate commerce "among the several States." In considering the effect of this clause the United States Supreme Court has asked whether a state tax burdens interstate commerce by placing it at a disadvantage as compared to or in competition with intrastate commerce. *McGoldrick v. Berwind–White Coal Mining Co.,* 309 U.S. 33 (1940);

Northwestern States Portland Cement Co. v. State of Minn., 358 U.S. 450 (1959). Where there is no such discrimination it has been recognized that the power of a state to tax is not inconsistent with the powers of Congress under this clause. *General Motors Corp. v. Washington,* 377 U.S. 436 (1964); *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937); *Drown v. U.S.,* 198 F. 2d 999 (C.A. Cal. 1952), *cert. den.* 344 U.S. 920 (1953); *Washington–Oregon Shippers Co–op Ass'n. v. Schumacher,* 59 Wash. 2d 159 (1961), *cert. den.* 370 U.S. 937.

In the instant case there was no showing, or even allegation, that the assessment of use tax on the receipt and use of processed data in any way burdens interstate commerce by placing it at a disadvantage as compared to intrastate commerce. On the contrary, R.C. 5741.02(C)(2) expressly prohibits the assessment of use tax on the use of property, when the acquisition of the property, if made in Ohio, would not be subject to the sales tax.

Similarly, there is no issue of multiple taxation by Ohio and another state. Nowhere in its jurisdictional statement has the appellant even suggested that it has been or would be subject to tax on the transaction in another state. Furthermore, the Ohio statute specifically exempts property from the use tax to the extent that sales or use tax has been paid to another jurisdiction. R.C. 5741.02 (C)(5).

As for the fact that the data is processed on a computer located outside Ohio and communicated to the appellant via interstate telephone lines, such fact does not preclude an assessment of use tax on the receipt and use in Ohio of the processed data. This Court has already upheld a state's assessment of use tax on use in that state, even though the property was not purchased in the state.

See, for example, *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941), in which the Court considered Iowa's attempt to apply its use tax to the respondent's mail order business, conducted directly between customers in Iowa and the respondent's mail order houses outside the state. The Court upheld the application of the Iowa tax, observing in part as follows at p. 363:

> In passing on the constitutionality of a tax law "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Commission,* 286 U.S. 276, 280, 52 S.Ct. 556, 557, 76 L. Ed. 1102, 87 A.L.R. 374; *Southern Pacific Co. v. Gallagher,* 306 U.S. 167, 177, 59 S. Ct. 389, 393, 83 L.Ed. 586; *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 61 S. Ct. 246, 250, 85 L. Ed. 267, 130 A.L.R. 1229, decided Dec. 16, 1940. *The fact that under Iowa law the sale is made outside the state does not mean that the power of Iowa "has nothing on which to operate." Wisconsin v. J.C. Penney Co., supra. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is conserned, "has been withdrawn from the arena of debate." Henneford v. Silas Mason Co.,* 300 U.S. 577, 583, 57 S. Ct. 524, 527, 81 L.Ed. 814; *Southern Pacific Co. v. Gallagher, supra.* It is one of the well-known functions of the integrated use and sales tax to remove the buyers'

> temption "to place their orders in other states in the effort to escape payment of the tax on local sales." *Henneford v. Silas Mason Co., supra,* 300 U.S. at page 581, 57 S. Ct. at page 526, 81 L. Ed. 814. As pointed out in that case (300 U.S. at page 582, 57 S. Ct. at page 526, 81 O. Ed. 814), *the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is "upon the privilege of use after commerce is at an end."* And see *Southern Pacific Co. v. Gallagher, supra. Use in Iowa is what is taxed regardless of the time and place of passing title* and regardless of the time the tax is required to be paid. *Cf. McGoldrick v. Berwind–White Coal Mining Co.,* 309 U.S. 33, 39, 60 S. Ct. 388, 393, 84 L. Ed. 565, 128 A.L.R. 876. (Emphasis added)

See also *General Trading Company v. Tax Comm'n.* 322 U.S. 335 (1944), and *National Graphic Society v. California Board of Equalization,* 430 U.S. 551 (1977), to the same effect.

For its part, however, the appellant has attempted to characterize this as an unapportioned tax on its use of computer time, as well as terminals and programs. Thus, it argues that the tax is on an interstate activity, namely, the use of an out-of-state computer. There is no basis for this argument. To be sure the assessed base charge covers a variety of costs incurred by EDS in providing data-processing for the appellant, including the cost of running its computer in Dallas, Texas. However, as the Board of Tax Appeals expressly found, the activities

of EDS under its transaction with the appellant were substantially identical to those considered and held taxable in earlier cases; and the product of those activities (i.e., the processed data) is received and used by the appellant in Ohio.

This is not a case in which the appellant has a divisible contract for the preparation of programs, the use out-of-state of a computer, and the use in-state of terminals. There is no billing based on computer time. Rather it is a billing for the performance of all activities necessary to process the appellant's data. Thus, the appellant was not merely buying computer time; it was paying EDS to perform data-processing. To this end EDS also prepared the necessary programs for use on the computer in Dallas. Indeed, as noted above, the appellant has no employees in Dallas. The fact then that the appellant's employees in Ohio may use a terminal to communicate interstate with EDS and retrieve processed data in no way precluded the assessment, because, as the Board noted, this was a data-processing transaction and the use tax was on the appellant's receipt and use of the print-outs in Ohio. To use the words of this Court in *Nelson v. Sears, Roebuck & Co., supra,* "the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is upon the privilege of use after commerce is at an end."

In arguing then that Ohio has unconstitutionally assessed an unapportioned use tax on the use of a computer located out of state, the appellant is really disputing the nature of the assessment and the use on which it is based. This is not a federal question, but a question of fact and of state law as applied to that fact. It can only be viewed as a federal question if the Board's findings of

fact are disturbed.[1] This is not the purpose of an appeal to this Court. On the contrary, this Court will decline to review state court judgments which rest on independent and adequate state grounds. *Fay v. Noia,* 372 U.S. 391 (1963). The factual and legal character of the transaction under Ohio laws provides such grounds and there is no reason for this Court to undertake further review.

---

[1] Even the Ohio Supreme Court will not substitute its judgment for that of the Board of Tax Appeals on questions of fact. *Financial Computer Services, Inc. v. Lindley, supra.*

CONCLUSION

For the reasons set forth above the appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Ohio court.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

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30 East Broad Street, 10th Floor
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ATTORNEYS FOR APPELLEE

APPENDIX

Ohio Revised Code Section 5741.02

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property, as follows:

*** *** ***

(C) The tax does not apply to the storage, use, or consumption in this state of the follwoing described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Tangible personal property, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code;

(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within

this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

(4) Transient use of tangible personal property in this state by a nonresident tourist or vacationer, or a non-business use within this state by a nonresident of this state, if the property so used was purchased outside this state for use outside this state and is not required to be registered or licensed under the laws of this state;

(5) Tangible personal property upon which taxes have been paid to another jurisdiction to the extent of the amount of the tax paid to such other jurisdiction. Where the amount of the tax imposed by this section and imposed pursuant to section 5741.021 [5741.02.1] or 5741. 022 [5741.02.2] of the Revised Code exceeds the amount paid to another jurisdiction, the difference shall be allocated between the tax imposed by this section and any tax imposed by a county or a transit authority pursuant to section 5741.021 [5741.02.1] or 5741.022 [5741.02.2] of the Revised Code, in proportion to the respective rates of such taxes.

As used in this subdivision, "taxes paid to another jurisdiction" means the total amount of retail sales or use tax or similar tax based upon the sale, purchase, or use of tangible personal property legally levied by and paid to another state or political subdivision thereof, or to the District of Columbia, where the payment of such tax does not entitle the taxpayer to any refund or credit for such payment.

For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to

prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.

As set forth in Amended Substitute Senate Bill No. 544, effective June 29, 1974, 135 Ohio Laws 483, 518-520.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Motion to Dismiss or Affirm have been served on the appellant by forwarding such copies to Dennis J. Barron, Counsel of Record, to Larry H. McMillin, 2500 Central Trust Center, 201 East Fifth Street, Cincinnati, Ohio 45202, and to Mary Ann Overholt, the Union Central Life Insurance Company, P.O. Box 179, Cincinnati, Ohio 45201, attorneys for appellant The Union Central Life Insurance Company by United States mail, postpaid, this _____ day of January, 1985. I further certify that all parties required to be served have been served.

JAMES C. SAUER
Counsel of Record
Assistant Attorney General